



1985

The Rise and Ruse of Administrative Law and Scholarship

Allan C. Hutchinson

Osgoode Hall Law School of York University, ahutchinson@osgoode.yorku.ca

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/scholarly_works

Recommended Citation

Hutchinson, Allan C. "The Rise and Ruse of Administrative Law and Scholarship." *The Modern Law Review* 48.3 (1985): 293-324.

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

THE RISE AND RUSE OF ADMINISTRATIVE LAW AND SCHOLARSHIP

FOR many members of the legal community, the signal achievement of the past two decades has been the rise of administrative law. The 1964 decision of *Ridge v. Baldwin*¹ has been hailed as a "milestone in the history of judicial pronouncements"² and the birthdate of the revival of administrative law in England.³ Roused from their slumbers, the judicial Rip Van Winkles have taken the State to task and imposed a strenuous regime of administrative legality. In the slipstream of this judicial activity, there has been a corresponding surge of academic interest and output. While other regions of the common law atrophy and die,⁴ administrative law and scholarship is pronounced healthy and thriving. After 21 years, administrative law has come of age; the best is yet to come. Against such an exciting and optimistic backdrop, this article seeks to present a more realistic scenario, presently depressing but potentially exciting. It argues that the doctrine of judicial review of administrative action is quantitatively insignificant and qualitatively indeterminate. As such, this article unashamedly picks up the gauntlet thrown down by Patrick McAuslan and accepts his challenge to carry out an ideological analysis of the current system and to experiment with new theories of administrative law.⁵ It is a self-conscious attempt "to live dangerously, to chance [my] arm and philosophise."⁶

The rise of administrative law and scholarship is a ruse. For all the

ballyhoo, the impact of the law on the administrative process is marginal. The rhetoric is far removed from the reality. The importance of administrative law lies in its ideological rather than its instrumental function. Administrative law and scholarship facilitate and legitimate administrative power whose exercise and abuse they exist to constrain and eradicate.⁷ In so far as the supposed need and justification for judicial review is premised on democratic inertia or indifference and legislative impotence or overwork, attention must switch to these institutional evils. The reform and revitalisation of the democratic organs of government must be adopted and pursued. An ounce of democratic prevention is better than a pound of judicial cure. The vast institutional and intellectual resources invested in administrative law and scholarship must be redeployed.

Of course, to criticise administrative law and to advocate the abolition of judicial review is not to approve of maladministration. As presently constituted, administrative agencies and tribunals are as undemocratic as the courts. Yet, a commitment to criticism represents a constructive step towards an effective control of the administrative process. The courts are constitutionally and democratically incapable of acting as a "bridle for [the administrative] Leviathan."⁸ Indeed, "the proclaimed revival of judicial review

. . . is really wishful thinking by academic commentators and judges."⁹ Also, a troubling paradox lies at the heart of this resurgent activity. The aim and rationale of judicial intervention in the administrative process is to avoid a monopoly of power with its tendency to corrupt and to curtail individual

freedom. Yet, in so doing, the judges are open to the charge that this reinforces their own monopolistic position and power.

Sadly, as so often, legal academics have allowed themselves, unwittingly or otherwise, to be used as ideological apologists, identifying political impartiality and conceptual coherence in the jumble of decisions. They recognise an appropriate and realisable role for the courts in supervising the legality of administrative acts, while leaving their substantive merits to political modes of control.¹⁰ Yet, there is developing a powerful critique of this traditional scholarship.¹¹ In this sense, the present article does not make any claims to originality or novelty. However, it does adopt a very different methodology which offers a more structured, sustained and cogent account of the workings of administrative law and the legal process generally. Whereas other critics retain a lingering faith in the potential efficacy of judicial review, suitably reformed and reconstituted, this article suggests that the retention of *any* form of judicial review cannot be justified if our democratic commitments and ambitions are taken seriously.

It is the burden of this article to substantiate these claims which will appear extravagant, if not actually offensive, to many. It is a modest essay in Critical Legal Scholarship.¹² It will suggest the new democratic paths to be explored, if the administrative process is to serve the genuine interests of the governed. The article is divided into four sections. First, the theoretical foundations of the critique will be

sketched and the problematic relation between the individual and the State introduced. Secondly, an analysis of the courts' handling of administrative disputes is offered. This section forms the bulk of the paper and touches upon different aspects of the judicial process, including its doctrinal indeterminacy and its practical marginality. Although far from exclusive, there is a strong focus on the saga of the G.L.C.'s "Fares Fair" scheme. Thirdly, a critical survey of the burgeoning scholarly literature is presented which focuses upon its theoretical reductionism and its constructivist inadequacies. Finally, some positive and tentative proposals for reform are put forward.

I. LAW, STATE AND THE INDIVIDUAL: THE CONTRADICTION OF LEGAL DOCTRINE

A. *A Critical Prolegomena*

In all its guises, Western thought has been devoted to containing the corrosive and subversive messages of social contradiction and historical contingency. Political and legal theory has sought to deny two fundamental and related truths. First, there is no natural or necessary form of social life. Existing social arrangements can lay no claim to objective or universal validity. They represent nothing more than temporary and historical solutions to the problems of human interaction. There is no one true, enduring and ahistorical form of

social existence. Secondly, this historical contingency feeds upon the contradiction in social life between the individual and the community.¹³

Both individualists and communitarians insist that there exists a mere conflict which can be rationally resolved and the resulting solution be possessed of objective moral force. Yet, there is actually a contradiction between individual choice and communal control. They are antithetical concepts and defy compromise or mediation. Interaction with others is both necessary to and incompatible with freedom. Communal control protects and facilitates individual freedom as well as threatening to overwhelm it. In crude terms, whereas communitarianism sacrifices the individual to the collective will, liberalism worships the individual at the expense of the communal good. An individual is more than an automatic functionary of some holistic society or an obsessive egoist in an alienated world.

The universe of legal discourse is profoundly and complexly implicated in this political struggle. The enterprise of adjudication and legal scholarship serves to clothe social arrangements with the essential garments of legitimacy. Judges and scholars contribute to the prevailing ideology or mind-set which insists that the present organisation of society is not only rational and just, but necessary and inevitable. Moreover, the construction of elaborate schemes of legal rights and entitlements from available legal materials helps to justify the status quo and erect formidable barriers to social change. Although hierarchy and domination are rife within society, the

ideal of governance according to the rule of law masks these offensive facts. By pretending that legal outcomes are the product of apolitical and neutral modes of argument rather than the imposed preferences of an arbitrary hierarchy, the rule of law contributes to the transformation of an illegitimate world of social disorder into a legitimate world of legal right. Legal thought operates as an intellectual tool for the suppression of historical contingency and the denial of social contradiction. It helps to obscure the fundamental truth that everything is in the irresistible process of becoming and not being. Modern legal thought offers itself as a timeless way of understanding *and* conquering the world. Nevertheless, the universe of legal discourse does not provide a true mirror-image of the socio-political culture. There is an element of distortion. In Kuhnian terms, the proliferation of "anomalies" makes untenable the establishment and defence of a crude and directcausal nexus between the material conditions of social life and its legal superstructure.¹⁴ While the extant legal materials are constitutive of a social system and sustain *in part* the existing hierarchy, it is fanciful to suggest that a "capitalistic" social system, able to weather the storms of welfare statism and industrial nationalisation, necessitates a particular regime of legal rules.¹⁵ Consequently, the law is not simply an institutional instrument at the disposal of the ruling hierarchy. It possesses some "relative autonomy." The historical consciousness reigns, but does not

govern absolutely. The need for legitimation is so strong that it may best serve the dominant groups in society to encourage or permit some decisions which benefit the dominated. As E. P. Thompson

concludes:

"The rhetoric and the rules of a society are something a great deal more than sham. In the same moment they may modify, in profound ways, the behaviour of the powerful, and mystify the powerless. They may disguise the true realities of power, but, at the same time, they may curb that power and check its intrusions."¹⁶

The law is like a dog on a long leash. Although it will ultimately follow the lead of its political master, it has considerable range of movement. It can wander from the chosen path and cause considerable damage and frustration.

Accordingly, the outcome of struggles within the legal arena are not dictated solely by the whims of the dominant hierarchy. Legal doctrine does not conform to any simple logic and is unified only by its enduring indeterminacy; there exists "a permanent disequilibrium of doctrine."¹⁷ With imagination and industry, legal materials can be organised so as to support radically inconsistent positions. Indeed, most modern legal theorists have conceded that "law . . . is deeply and thoroughly political," but they contrive to insist that it is "not a matter of personal or partisan politics."¹⁸ Abandoning the high ground of formalism, they search for a "background theory" which shows the legal data in their best light as precepts of political morality.

Yet the very diversity of theories offered undermines the enterprise. In so far as it is possible to defend a variety of plausible theories, no one proposal can lay claim to exclusivity or universality.¹⁹ Meaningful interpretation is only possible where there *already* exists a commitment to a shared set of values. However, as in the political domain, the legal territory is a focus of conflict. There is a pervasive matrix of contradictory forces which prevents the establishment of a sufficiently full tradition of shared understandings. The indeterminacy of legal doctrine finds its energy and power in the antithetical modalities of individual and community. This deep logic of contradiction sustains and ensures an inescapable scheme of doctrinal indeterminacy. Doctrine can be consistently converted into its own opposite self-image.

B. *The Administrative State and its Citizens*

The courts are a venue for the unending struggle between the competing world visions. Although fundamentally contradictory, they are believed in and espoused at the same time. In mistakenly viewing these visions as capable of compromise or mediation, judges and lawyers are not active participants in some vast Machiavellian plot; they are conscientious players in an irresistible and endless game of social chess. The problem lies not so much in their self-imposed, although rarely realised, utopian ambition, but in the hopelessness of making anything more than intuitive, ad hoc guesses at

the desirability of any particular social arrangement. The judge and legal scholar cannot evade the role of social visionary. The dialectical tension between individualism and communitarianism generates competing legal principles that march in pairs throughout the law. While the doctrinal manifestations of one vision may temporarily gain the upper hand and whole areas of doctrine appear uncontroversial, the insoluble quality of the contradiction guarantees that renewed struggle is always close at hand. The alternate vision can be contained, but can never be obliterated. There is no logical or natural point at which one vision ends and the other begins. At every turn, choices must be made.

The esoteric and convoluted nature of legal discourse is the direct consequence of the need to obscure this inescapable element of judicial choice. Rather than "arbitrate conflict through the impartial elaboration of a mechanical legal analytic,"²⁰ the judge is a political and creative actor. To judge is to choose. The evolution of legal doctrine comprises an endless series of fragile and makeshift compromises between contradictory ideals. Importantly, there is no meta-theory available for determinate guidance. Legal discourse is nothing more than a stylised version of political discourse. Legal materials comprise a repository of technical resources by which to naturalise and universalise the temporary structures that interrupt the flow of social history. Yet, the analysis is not nihilistic. It treats legal doctrine seriously. Law is not a jumble of unintelligible materials, but is shaped by the deep and contradictory structure that informs contemporary hierarchical society. The vitality and history of the common law can be

traced to the continuous oscillation between competing social visions. This dialectical drama is most openly played out in the arena of administrative law where social concerns and individual interests collide head-on. As one prominent commentator notes, the challenge is "to balance action taken on behalf of the public at large against the interests of a single individual whose rights . . . may be affected by the exercise of the public power."²¹

As abstract and ahistorical visions, individualism and communitarianism represent highly stylised ends of an ideological spectrum. Individualism represents a world consisting of independent and self-sufficient persons who confidently draw up and robustly pursue their own life-plans. Values and tastes are relative and subjective; individuals seek to maximise their own preferences. The legal system supports such a regime by protecting private property, enforcing bargains and creating autonomous spheres of action.²² At the other extreme, communitarianism comprises a world made up of interdependent and co-operating persons. Recognising the vulnerability of individuals, it encourages greater solidarity and altruism. There exists a central belief in the possibility of communal values and the capacity to know a common good that cannot be known alone. The legal system contributes to such a regime by dismantling private property, regulating the distribution of resources and providing for interactive projects.²³ However, each vision represents only a partial and incomplete depiction of social life and its possibilities. Neither is reliable or realisable as an exclusive basis for social

organisation. Individualism must depend upon some "nightwatchman State" to guarantee the conditions for effective individual achievement. Similarly, communitarianism must acknowledge the claims of individuals to their own tastes and preferences. Both atomism and holism are unworkable and indefensible. However, once the viability of the spectral extremes is denied, the slide into doctrinal indeterminacy is ensured.

An actual example will clarify this argument. A persistent problem for administrative lawyers is to determine the circumstances in which an individual is entitled to an administrative hearing. Traditional legal scholars are obliged by their own jurisprudential premises²⁴ to claim that there is some neutral calculus which generates a coherent and consistent doctrine of "hearings." But the actual practice repudiates the theory.²⁵ In extreme terms, there exists a stark choice between "no hearing" and a "full hearing." These options crudely reproduce the basic contradiction.²⁶ A "no hearing" doctrine would pull towards communitarianism with its implicit assumptions that the public good outweighs individual interests and that decisions are best made in terms of community solidarity. A "full hearing" doctrine, while accepting that the public good might be preferred over individual rights, maintains that individuals ought to be given the fullest opportunity to defend and argue their own individual claims. In so far as traditional legal thought is premised on the necessary and realisable

reconciliation of the competing interests of individuals and community, it would be the negation of its very *raison d'etre* to opt completely for either extreme. Doctrine vacillates. Neither legal logicians nor policy analysts can provide objective guidance as to where doctrine ought to position itself along the continuum.

While the dominant principle in contemporary doctrine favours a "full hearing,"²⁷ there exists a counter-principle which concedes that "no hearing" is justified in certain circumstances.²⁸ However, once a valid communitarian component is admitted, it must be arbitrarily held in check or else it will consume the whole doctrine. At any time, the discrete legal pieces could be rearranged into a completely different doctrinal jigsaw. Determinacy is contrived, superficial and ephemeral. The still waters of legal doctrine run deep and dangerous. The apparent calm is continuously being disturbed. So much so that surface determinacy must give way to deep indeterminacy. Ever present, the doctrinal struggle most clearly manifests itself in "instances of exemplary difficulty"²⁹; cases where the tension between contradictory forces and its previous suppression become so volatile that the tenuous coherence of doctrine is shattered. Along with a broader systemic analysis, these recalcitrant instances will comprise the critical focus of the paper.

C. Substance and Symbol

It is often said that Britain has become a socialist state. Indeed, as early as 1905, Dicey opined that the years from 1865 to 1900 were a "period of collectivism."³⁰ While it is true that Britain has added the trappings of a

welfare state, society remains founded upon the individualistic institutions of private property and private enterprise. Notwithstanding the demise of laissez-faire capitalism, British society is dominated by the commitment to industrial profitability.³¹ There is a large public sector, subject to governmental regulation, but the vast amount of wealth and power is still wielded by private interests. In retrospect, the move from a market economy toward a more mixed economy occurred to avert crisis and to enable the continued expansion of private capital accumulation.³² The governmental apparatus has fallen captive to large-scale business corporations which are, in turn, controlled by a small coterie of privileged individuals. The creation of a large public sector has facilitated the concentration of economic power as much as its redistribution. While benefiting many, the welfare state has acted as a prop for beleaguered private centres of economic and political domination. Any loss in autonomy has been adequately compensated for by greater material gains. Moreover, the expansion of the regulatory state has served to divert attention away from the private sector. It has enabled "the citadels of private power [to remain] insulated from the risks of party-political conflict."³³

Although Parliament has been the builder of the regulatory state, the Executive has been the architect. Moreover, Parliament has sub-contracted out most of the work. There exists a mammoth administrative

apparatus to implement, monitor and enforce the legion activities of government. Originally a creature of legislative enactment, the administrative process has taken on an institutional existence of its own. This development has profoundly affected the balance and allocation of power within the British system of governance. Agencies and tribunals manage the nation's business in accordance with governmental policies, conceived by the Executive and rubber-stamped by an obedient Parliament. Few aspects of people's lives from cradle to coffin are unaffected by the state. Ostensibly in the public good, the state acts as protector, dispenser of social services, industrial manager, economic controller and arbitrator.³⁴ Throughout the century, there has been a marked shift in the governmental centre of gravity. Although private interest remains the life force, the public process of administration has become "the pulse of the modern legal order."³⁵ Administrators not only make far more law than legislators, but they resolve far more disputes than judges.

The legal process has played a major role in distorting this reality. There is a marked discrepancy between the actual practice of the administrative process and the picture painted of it by legal doctrine. This ideological function of the law is of paramount importance.³⁶ Also, in responding to the establishment of the administrative process as the fulcrum of modern governmental power, the courts have been

dually motivated. First, they have sought to reassert their waning institutional power and to confirm their essential relevance to the control of illegitimate power. Some involvement with the burgeoning administrative activities of the state seemed appropriate. However, secondly, they have been very concerned to justify their own exercise of power and to adopt a stance that befits their perceived constitutional responsibilities and powers. Their achievement has been mixed. As an ideological exercise, they have been successful in persuading people of their constitutional propriety and effectiveness. As a matter of practical effect, they have been less successful. Although the history and development of judicial review is fascinating reading,³⁷ its present status and ambit that is more important. A doctrinal model of the objectives and limits of judicial review can be constructed from recent judicial statements.³⁸ It must be emphasised that this model is not intended to be an account of what the courts do, but only of *what they say they do*.

D. *The Rhetoric of Judicial Review*

The doctrinal model of judicial review centres upon two important issues; the appropriate division and exercise of governmental power. Not surprisingly, the dominance of the individualistic vision is marked. Within society, people are assumed to be constantly at odds and band together to form a government. Compromise is considered preferable

to the oppressive uncertainty of unrestrained struggle. The limited duty of the government is to enact a body of norms through which to regulate the social interaction of its atomistic citizens. To enforce, interpret and apply these norms, a judicial branch of government must be established.³⁹ However, problems of democratic legitimacy arise. This constitutional dilemma of decision-making is overcome by resort to the basic dichotomy between values and facts. Whereas values are considered personal, subjective and arbitrary, facts are taken to be homogenous, objective and orderly. The legislature is presumed to operate in the unstable realm of values and has the responsibility to enact laws designed to achieve substantively just compromise between competing values. However, once its decisions are translated into a set of rules, there is a clear shift from the realm of values to the domain of facts. The Machiavellian world is left behind and the constitutional Rubicon is crossed. Expressed as a rule, the legislative compromise of values is converted into fact and becomes amenable to scientific interpretation and application; "[t]he sovereignty of Parliament runs in tandem with the rule of objective law."⁴⁰

In this way, the fundamental democratic demands of popular consensus, as sought in the legislative process, and rationality, as embodied in the judicial process, are claimed to be satisfied. Further, arguments of law and morality are rendered mutually exclusive.

Through the neutral application of rules, the judges are insulated from political controversy.⁴¹ The compulsion to reason within a closed system of premises guarantees the enduring integrity of the constitutional compact. Within this constitutional scenario, administrative agencies only exist as the "executory amanuenses of the legislative will."⁴² However, overwhelmed and overcommitted, the legislature must delegate massive authority to avoid a total paralysis of government. Inevitably, this delegation becomes an abdication of power. Accordingly, the courts step in to take up the democratic slack. They perform a constraining function and act as the policing agents of the legislature.⁴³ With suitable constitutional deference, judges resist the temptation to second-guess the exercise of administrative discretion.⁴⁴ It is a matter of formal process and not substantive decision. The courts act as frontier guards between the spheres of state action and citizen activity. Legislators are the cartographers and legislative enactments are the boundary markers. Indeed, the ambit, if not the source, of the judicial policing power is also conferred and confined by legislation.

To guard against the temptation to establish themselves as independent power centres, judges claim to adjudicate disputes between the State and its citizens by the rigorous and faithful implementation of legislative intent. Neutrality and objectivity is preserved by casting statutory interpretation as an exercise in linguistic analysis. Judges

search not for what the legislature intended, but the true meaning of the words used.⁴⁵ The legislative expression of the political compromise is treated as a certain fact whose proper application can and must be determinatively effected through an impersonal and apolitical set of interpretive techniques. Furthermore, it is presumed that, unless Parliament states to the contrary, administrative discretion is subject to the existing common law rules. The essential quality of their involvement is neatly captured by Lawton L.J.:

"In the United Kingdom . . . policy is determined by ministers within the legal framework set out by Parliament. Judges have nothing to do with either policy making or the carrying out of policy. Their function is to decide whether a minister has acted within the powers given him by statute or the common law. If he is declared by a court, after due process of law, to have acted outside his powers, he must stop doing what he has done until Parliament gives him the powers he wants. In a case such as this I regard myself as a referee. I can blow my judicial whistle when the ball goes out of play; but when the game restarts I must neither take part in it nor tell the players how to play."⁴⁶

In this way, the judges claim to underwrite their constitutional power and transcend vulgar political debate and still make a valid contribution

to the continued efficacy of the basic compact between the State and its citizens. Importantly, they claim to do so within the bounds of constitutional propriety. Yet, the rhetoric of judicial review is not substantiated by the reality of performance. The judicial achievement falls hopelessly short of its ambition. Indeed, the ambition is futile. With the best will, the promise could not be performed. It is the burden of the next section to support these claims.

II. THE ADMINISTRATIVE PROCESS AND THE COURTS

A. *The Politics of Judicial Policing*

In performing its self-acclaimed role as a constitutional police force, the judiciary promotes an image of impartial obedience and servitude, faithfully adopting a deferential posture to the will of Parliament. Indeed, the cornerstone of administrative law has been the notion of *ultra vires*. The judicial task is intended to exhaust itself in ensuring that the administrative process operates within the legislatively ordained parameters of permissible conduct. Although not the exclusive device of containment, administrative law is primarily a matter of statutory interpretation. Accordingly, this section will demonstrate that statutory interpretation is not a technical and objective activity, but is inescapably creative and political. Although this characteristic can be disguised or obscured, it can never be side-stepped or eradicated.

Moreover, the indeterminacy of those politics will be constantly revealed. As an exhaustive account of the judicial handling of the administrative process is beyond this paper, a small number of discrete, but representative topics will be dealt with.

Although the courts insist that statutory interpretation can be effected apolitically, they nonetheless claim that the power to interpret statutes is pivotal. It is the courts' construction of legislative words and not the words themselves that is law.⁴⁷ Not only is the extent of that power extremely limited, but the claimed existence of such a power sits uneasily with their presentation of statutory interpretation as a technical exercise in linguistic analysis. Whichever one of the great triumvirate of approaches, "literal," "golden" or "mischief,"⁴⁸ is used, the courts "are seeking not what Parliament meant but the true meaning of what they said."⁴⁹ By drawing a marked distinction between the legislative and the interpretive function, the courts hope to legitimate their power. But this is little more than a constitutional pose. At a general level, it can be observed that words do not interpret themselves and that the analysis of language is not a value-free exercise. For instance, the courts' handling of so-called "gaps" in a statutory scheme is contradictory and inconsistent.⁵⁰ Taking a strict stance, the court will treat the statutory text as exhaustive and strike out the claim as revealing no legal cause of action. In so doing, the court will have

flouted reality by acknowledging that it cannot generate a solution to the inevitable batch of "unforeseen" cases. Further, if a liberal stance is taken, the court will recognise the existence of a "gap" and seek to fill the legislative silence. To do this, the court will have to resort to considerations extraneous to the text of the statute. Moreover, the initial recognition of a gap is

premised on the assumption that the statutory text is not an exhaustive expression of the sovereign will of Parliament. Adopting either a strict or liberal position, the traditional approach is incomplete and inconsistent.

1

The recent fiasco over the Greater London Council's "Fares Fair" scheme emphasises the creative dimension of statutory interpretation.⁵² Under the harsh glare of media-fuelled public interest, the rhetoric of judicial review was represented and indicted in microcosm. It was an ironic version of judicial trial by political ordeal. The facts are too notorious to warrant detailed repetition. After a successful election campaign, the Labour-controlled G.L.C. instructed the London Transport Executive (L.T.E.) to reduce bus and tube fares by 25 per cent. The cost was to be financed by a supplementary levy on the ratepayers. As a result of the new fares scheme, the Government reduced its block grant to the G.L.C. This effectively doubled the cost of the reduction in fares and a supplementary rate precept was issued to all 32 London boroughs. Bromley L.B.C. sought to quash the imposition of the

supplementary rate and restrain the G.L.C. from continuing with the new fares scheme. Although the Divisional Court rejected Bromley L.B.C.'s application on the ground that the G.L.C.'s action lay at the margin of what is permissible, the Court of Appeal found for Bromley L.B.C. and held the precept to be null and void. In a unanimous decision, the House of Lords upheld the decision of the Court of Appeal. The thrust of the courts' decisions was that the Transport (London) Act 1969 did not empower the G.L.C. to finance a reduction in fares by a supplementary precept. Although the G.L.C. had broad policy and grant-making power over the L.T.E., it was under a duty to promote the provision of integrated, efficient and economic transport facilities and services for Greater London.

For the House of Lords, the central issue was legality: was the decision of the G.L.C. within the limited powers that the statute had conferred upon it? This question of *ultra vires* could be disposed of by ascertaining the "proper,"⁵³ "true,"⁵⁴ or "correct"⁵⁵ meaning of "economic." Although the court conceded that the Act was drafted in "opaque and elliptical language," evidenced "a lack of clarity,"⁵⁶ was "vague, possibly with design"⁵⁷ and, in particular, that the term "economic" was "chameleon-like,"⁵⁸ the Law Lords

sought to attach a precise meaning to "economic." Moreover, the interpretative process was to be "looked at objectively."⁵⁹ For instance,

Lords Wilberforce and Diplock recognised that the subsidisation of public transport from public funds and its treatment as a social service raised grave and important issues of transport policy, but remained adamant that it was "a matter of political contr?versJ; . . . [Yhich the court] must scrupulously efrain .from entenng." In their own terms, the Law Lords were msufficiently scrupulous. To ignore the debate over whether transport is a social service supports the view that it is not a social service. Moreover, failure to inquire into Parliament's contribution to the debate casts an even greater air of unreality over the attempt at statuto1?; interpretation. Although not conclusive of legislative intent,

¹ Richard Marsh, then Minister of Transport, in moving the second reading of the Bill, gave a strong indication of Parliament's stance on the G.L.C.'s policy and grant-making power:

"This is very important, because if the Council wishes the executive to do something that will cause it to fall short of its financial targets, it will itself have to take financial responsibility for it. The Council might wish, for example, the executive to run a series of services at a loss for social or planning reasons. It might wish to keep fares down at a time when costs are rising and there is no scope for economies. It is free to do so. But It has to bear the cost. "62

Rather than face the issue of transport policy squarely and openly, the

Law Lords decided that "the only *safe* course is to try to understand the contemporary language."⁶³ In so doing, they concluded that the "economic" restraint on the G.L.C. meant that it must act in accordance with ordinary business principles; transport was to be run as a cost-effective business enterprise.⁶⁴ While transport, need not operate at a profit, it did demand that the

G.L.C. must seek to avoid loss and, certainly, adopt a policy of loss-making. Lord Scarman left no room for doubt when he said that the "reduction was adopted not because any higher fare level was impracticable but as an object of social and transport policy. It was not a reluctant yielding to economic necessity but a policy preference. In so doing, the G.L.C. abandoned business principles. That was . . . wrong in law."⁶⁵ By placing such a limited definition on "economic," the House was not only delivering a slap in the face to local democracy, but was confirming a very clear vision of society. The decision represents a clear political preference in favour of the ethic of private enterprise over that of collective consumption.⁶⁶ Yet, for present purposes, the existence of that choice is more important than the nature of that choice.

The meaning of "economic" is far from self-evident. Indeed, it is ludicrous to suggest that it has *one* "true" or "correct" meaning. There is a vast literature on the "economic" operation of public services and nationalised industries. Whether such organisations should seek to break even,

maximise profit, price discriminate, marginal cost price or the like is moot. At its broadest, "economic" can refer to any decision that concerns the distribution or allocation of resources.⁶⁷ Also, in a narrow sense, it can be argued that, as it is not politically or logistically feasible to charge private road users a realistic cost for the congestion they cause, subsidised public transport is the next best "economic" policy to reduce congestion and its costs.⁶⁸ Also, the extent of the subsidisation by G.L.C. is very low when compared to the annual investment by other municipalities in their transportation network.⁶⁹ Accordingly, the decision to construe "economic" as meaning "commercially viable" is by no means inevitable or rationally necessary. It represents a choice. It does not flow inextricably from the words of the statute, but demands a judicial interlocuter. The interpretative process is not mechanical or objective, but creative and relativistic.

Before examining the determinants of that judicial choice, there is a more subtle and, in a sense, more profound objection to the practice of judicial review and statutory interpretation generally. Under the traditional model, individual interests and preferences are in constant flux. Therefore, parliamentary rule-making occurs under conditions of uncertainty; a statutory enactment is based on a series of probabilistic assessments about its impact which in turn depends upon its interaction with other rules of law and their application to factual situations. Yet, by definition, although the legal element in this projected scenario will remain fixed, the nonlegal elements will be continually changing. In

such volatile circumstances, it will be extremely difficult to arrive at *any* just compromise of conflicting interests, however temporary or makeshift. The task of striking a just compromise effective over time will be practically and theoretically impossible. Further, this unpredictable interplay of facts and values will not only inhibit the implementation of the original compromise, but will inadvertently bring into play a whole new group of generative forces which will support an entirely different and "unconsented to" compromise. This means that the judge "creates, through his decision of particular cases, the situation from which will emerge an as yet indeterminate constellation of legal forces."⁷⁰

In this way, judges contribute to the future enactments of Parliament. Their decisions will have a redistributive impact likely to be different to that intended by Parliament and these will influence the political struggle whose institutional venue is, of course, Parliament. This is exactly what has happened in the aftermath of the *Bromley* case. Although the decision favoured its position and policies, the Government has removed future doubt and successfully introduced a new Transport Act which imposes stringent controls on locally subsidised public transport.⁷¹ Consequently, as a contributor to legislative resources and a creator of the private interests which effectively constrain and dictate the legislative pronouncements of Parliament, judges cannot treat statutes "as an external objective factor

validating whatever [they] may choose to do."⁷² Judges are political actors and must justify their contribution *to* the legal process rather than rely on their activities being justified *by* it. As such, judges shoulder the heavy burden of choice.⁷³

B. *The Social Visions of Judicial Review*

The law of judicial review is one doctrinal venue for the struggle over the terms and conditions of social life. Doctrinal principles are little more than historic plots on the legal graph which describes the contingent resolution of this dialectical tension between competing social visions. However, individual decisions are selective and amount to only fragmentary snatches of a more organic vision of social life. In any particular case, the outcome may be confused or uncertain and it will often be difficult to estimate which social vision has prevailed. In others, the decision may clearly represent the victory of one vision over another. Yet, over the long or medium haul, there will exist competing trends and conflicting themes. In the shifting sands of legal doctrine, pockets of stability appear but they are quickly disrupted by the swirling winds of litigation. Again, G.L.C.'s "Fares Fair" scheme offers a clear glimpse of this doctrinal indeterminacy. Few argue that *Bromley* was not a political decision.⁷⁴ Moreover, it can be easily exposed as a blatant attempt to frustrate the socialist ambitions of an elected local authority.⁵

Although the House of Lords sought to balance the interests of ratepayers and transport users, its reliance on a purely formal analytic ignored their substantive inequalities. The House argued that, as they represented 40 per cent. of the electorate and provided the major source of G.L.C. rates revenue, the interests of ratepayers acted as a legitimate check on G.L.C. programmes. Moreover, as most of the transport users were not ratepayers, G.L.C. had failed to give sufficient prominence to the ratepayers' interests.⁷⁶ On a head-counting basis, the House's conclusion seems sound and even defensible. Yet, the decision to attribute electors, ratepayers and transport users with equal formal status is a choice and not a given. It is part of the legal order and not the natural order of things. As over 60 per cent. of the rates are collected from commercial sources, the interests of corporate entities are given equal or greater weight than the electoral or travelling public. Accordingly, in the same way that G.L.C. made a choice to prefer transport users over commercial interests, *Bromley* represents a contrary preference. Indeed, as entry to the class of ratepayers is based exclusively on ownership of private property, the decision clearly favours the advantaged members of society over the less advantaged. In visionary terms, *Bromley* signifies a famous success for the support of individualism with its emphasis on free enterprise. For many, *Bromley* offers cogent evidence for the ideological bias of judicial review.⁷⁷ Not

only does it undermine any lingering claims about judicial neutrality, but is brandished as incontrovertible proof of their reactionary politics. Yet, such rejoicing or mourning is premature. No sooner had the dust been kicked up, let alone settled, than along came another gust of litigation.⁷⁸ Undeterred by its setback in *Bromley*, G.L.C. resolved to put into operation an alternative plan. It directed L.T.E. to reduce fares by 25 per cent.; the 17 per cent. increase in the deficit on L.T.E's revenue account was to be made good by a grant from G.L.C. Naturally, L.T.E. doubted the legality of this, so G.L.C. sought various declarations from the Divisional Court to validate its proposed scheme. While strenuously claiming to uphold and follow *Bromley*, the court held that the "new" scheme was lawful. This *volte-face* came as as much of a shock to G.L.C., albeit a pleasant one, as to the legal establishment. The attempt to weave the two decisions, *both* explicitly based on a *true* construction of the 1969 Act,⁷⁹ into the conceptual or ideological fabric will surely test the ingenuity and dexterity of the most gifted legal scholar or judge.

The central thrust of the Divisional Court's judgment in *Ex parte G.L.C.* seems to be that, whereas, in *Bromley*, the G.L.C. had arbitrarily proceeded to put their election promise into effect, the alternative plan had been arrived at after an informed and considered balancing of the transport users' and ratepayers' interests. Although the 1969 Act can

reasonably bear such an interpretation, the decision attaches an extremely generous meaning to *Bromley*. For most commentators, the *ratio* of *Bromley* is found in its "break-even" and "commercially viable" requirements.⁸⁰ Indeed, the Law Lords expressly refer to the actual policy decision and not just the process of decision-making as being unreasonable. In the light of such comparisons, the indeterminacy of legal doctrine seems manifest. If *Bromley* marks a success for individualism, *Ex p. G.L.C.* scores an equally famous victory for communitarianism or, at least, for the forces of anti-individualism. It seeks to promote the interests of the public at large over discrete segments of it. The dust of visionary conflict never settles. It is constantly blown around by the cross-currents of social struggle.

An equally compelling illustration of the doctrinal indeterminacy of judicial review is *Tameside*,⁸¹ another politically high-profile decision. Satisfied that he was acting unreasonably, the Secretary of the State sought an order of mandamus to force implementation of a comprehensive school system, earlier approved by him, but later postponed by the local authority. The House of Lords held that his opinion of reasonableness was insufficient *per se* to justify intervention; there must be a sufficient factual basis for him to decide that no reasonable authority would postpone such plans. For many, the decision was another thinly disguised attempt to maintain the status

quo and frustrate efforts to introduce an educational system based on a more egalitarian model. Yet, less than a year later, the Court of Appeal reached an entirely contrary result. In *Smith*,⁸² the local authority sought to change the grammar schools into comprehensives. A group of parents at one grammar school sought to restrain the move. They obtained an interlocutory injunction from Megarry V.-C., but it was discharged on appeal. The local authority had not misused their power, which they exercised in an informed and considered way. In such matters, the court held that it was fitting that the interests of the whole community prevail over the views of a discrete group of individuals.⁸³ Clearly, the two decisions pull in opposite directions; each tacitly sanctions a different scheme of social arrangements. Although each case involved a separate statutory provision,⁸⁴ both cases were disposed of on the basis of the "reasonable" exercise of discretion. This standard is sufficiently broad to embrace a wide range of applications. Such a reconciliation of *Tameside* and *Smith* must concede the political nature of the judicial task. Also, the argument that the courts simply protected the prevailing political preferences, as expressed in the local democratic process, against private or governmental interference is extremely difficult to sustain in light of the views stated in *Bromley* on the marginal weight to be given to electoral preferences.⁸⁵ Indeed, the conflicting views over the impact of local elections on an authority's activities gives further

support to the "indeterminacy thesis."

Finally, one more illustration can be drawn from the field of immigration law. It remains a sad, but undeniable fact that, except in times of economic expansion, immigrants have not been the favoured children of the politico-economic establishment. It is startling, therefore, that at a time of economic recession and legislative tightening of immigration controls, the courts seem to be taking a strong stand against the State in favour of what many would consider to be the most undeserving of characters, the illegal immigrant. I say *seem to be* because the performance of the courts in a line of cases ending with *Khawaja*⁸⁶ evidences further the inherent indeterminacy of legal doctrine. The central question was the proper role of the courts when the State detains people as illegal entrants and intends to deport them. More specifically, is the courts' function to determine simply whether there was sufficient evidence on which immigration officers could reasonably reach their decisions or whether their decisions are actually justified on the evidence? In less than a decade, the courts have embraced all possible solutions. As Lord Bridge noted, this is "a matter of high constitutional principle affecting the liberty of the subject and the delineation of the respective functions of the executive and the judiciary."

Beginning in 1974 with *Azam*,⁸⁸ it was held that the courts should

review the factual basis on which a finding that a person is an "illegal entrant" is made and set it aside if it is not justified by the evidence. This amounts to a "recedent fact" theory of review. However, by 1978 in *Hussain*,⁸ the courts had moved to a "reasonable grounds" approach which favoured the State. This test was formally approved by the House of Lords in 1980 in *Zamir*.⁹⁰ Yet, early in 1983, the Law Lords experienced a complete change of heart. In *Khawaja*, they held unanimously that the courts' function was to examine the actual evidence on which the immigration officer's finding was made. Stressing that the liberty of individuals was at stake and expressly departing from *Zamir*, the House decided that reasonableness was an inappropriate standard of review. Where executive authority is tied to the precedent establishment of a objective fact, the courts must determine whether the precedent requirement has been met. In Lord Scarman's words, "liberty is at stake: that is . . . a grave matter. . . [and] the reviewing court will therefore require to be satisfied that the facts which are required for the justification of the restraint put upon liberty do exist."⁹¹

This line of immigration cases underlines most of the major points made in this section. First, not only is the rhetoric of judicial review removed from its actual practice, the rhetoric itself is often inconsistent and contradictory. Far from fulfilling a limited policing function, the

courts have assumed the responsibility, as Lord Wilberforce puts it, "to see whether [the finding] was properly reached, not only as a matter of procedure, but also in substance and in law."⁹² Secondly, in performing that substantive inquiry, the courts do not consistently favour the interests of the dominant groups in society. Although taking a pro-individualistic position, the protection of illegal immigrants is not usually considered to be supportive of a conservative ideology. Thirdly, judicial indecision of the judges subverts the claim that there is a coherent conceptual pattern imprinted on the judicial fabric. The only perceivable "pattern" is the constant oscillation between competing social visions, albeit fragmentedly portrayed and vaguely grasped. The indeterminacy is natural and inevitable, representing an irrepressible dimension of the political condition. Judges and scholars cannot avoid being institutional brokers for competing social ideals. But they do deserve to be castigated for their efforts to deny the contingent character of social arrangements, to wrap this basic truth in a pseudo-scientific cloak of mystification and to pretend that the present organisation of society is rational, necessary and just. Their sustained efforts "make a particular scheme of the possible and desirable forms of human association stand in place of the indefinite possibilities of human connection."⁹³

C. *The Judicial Ouster of Privative Clauses*

The rationale for judicial review is said to be the constitutional and democratic need to regulate and resist the monopolisation and arbitrariness of State power. Yet there is discernible within the cases a less subtle and commendable sub-plot. In checking bureaucratic power, the courts have extended their own constitutional power. This self-aggrandising tendency is revealed in their handling of "ouster" or "privative clauses." According to judicial rhetoric, the courts are the willing servants of the legislative master.⁹⁴ With Tennyson's *Light Brigade*, the judiciary proudly proclaim that "ours is not to reason why, ours is but to do and die." Consequently, provided it expresses itself clearly, the legislature is reasonably entitled to expect that the judges will respect its wish to have them stay out of the administrative turf. Indeed, they have launched a counter-offensive. The privative clause is to legislative-judicial relations

"what the Maginot Line was to military tactics: a virtually impregnable legislative project of defence, designed to protect the [administrative process] from frontal assault. And now it has suffered the same fate. It has been outflanked by a judicial panzer attack, a virtual constitutional blitzkrieg."⁹⁵

As a general observation, the courts have construed preclusive provisions so as to limit, rather than debar, judicial involvement in the control of administrative action. While feigning deference to legislative intent,

the courts' power to review on jurisdictional grounds remains intact in spite of repeated legislative protestations and no matter how sweeping or encyclopaedic the clause. It is characterised as "a straightforward problem of statutory interpretation."⁹⁶ In the acclaimed decision of *Anisminic*,⁹⁷ the House of Lords held that a statutory provision that "the determination by the [Foreign Compensation] commission of any application made to them . . . shall not be called in question in any court of law" did not oust the supervisory jurisdiction of the courts. The courts have managed to achieve such "straightforward" interpretations by the familiar device of interpretative presumptions. The basic force of this position is that any *error* of law puts the tribunal outside its jurisdiction and places it within the supervisory jurisdiction of the courts. Although Lord Diplock concedes that Parliament can deprive the courts of all power, the present judicial disposition to privative clauses makes that merely a theoretical rather than a practical possibility.⁹⁸

This disingenuousness undermines the whole social compact which the courts claim to uphold and enforce. By adhering to a linguistic approach to statutory interpretation and hedging it with defensive presumptions, the courts manage to constrain and dictate the terms of Parliament's legislative competence. They impose a constitutional and linguistic straight-jacket on the legislature. The

message from the judges to the legislators rings loud and clear"Use a particular verbal formula if you want us to even consider implementing your decisions. Even then, nothing is guaranteed. Otherwise, you run the risk of having a different set of legal consequences occur than you bargained for." Accordingly, the general approach to statutory interpretation, especially when applied to privative clauses, severely confines and often subverts the wishes of Parliament. The rhetoric may be of constitutional partners, but the reality is of constitutional competitors. While pretending to be a bulwark against the usurpation of political power, the judicial process usurps the legislative function. The ghost of Lord Coke is alive and well; it stalks the corridors of legislative power.

D. *The Marginality of Judicial Review*

As a necessary corollary of assuming the management of the nation's business, the State has established a pervasive network of administrative agencies to carry out its decisions and plans. Indeed, a major reason for the creation of such a bureaucratic enterprise was dissatisfaction with the courts' performance.⁹⁹ There were doubts about their capacity and willingness to handle effectively the problems of collective consumption, especially when their traditional forte and preference was for the protection of individual rights.¹ Also, the selective, but

systematic attempt to withdraw vast areas of administrative competence from the judges through the enactment of privative clauses is indicative of this trend. Moreover, a crude analysis and comparison of judicial and administrative statistics provides ample support for the marginal operation of judicial review.

Apart from other administrative bodies, there are about 2,000 separate tribunals. Calculating *very* conservatively, there are over a million administrative decisions made annually. However, only a minute fraction of those decisions is reviewed by the courts. Although there has been an increase in applications for judicial review, the *ratio* of applications for judicial review of administrative decisions remains insignificant. Further, no more than 25 per cent. of the handful of applications are successful.² Also, a successful application only means that a decision will be set aside or quashed; it does not guarantee a favourable decision the second time around. A litigant may win the legal battle, but lose the administrative war. Nevertheless, while the resort to judicial review is a remote possibility, the spectre of judicial intervention might have an exhortatory and intimidating effect. Mindful of its possible invocation, the administrative process will remedy its practices to conform to the doctrinal dictates of judicial review. Such an argument places great and unjustified faith in the "inspirational" impact of law.

Little work has been done on the social consequences of law. Modern orthodoxy assumes the instrumental effect of legal precepts and decisions. The small amount of empirical work carried out indicates that the social

impact of law has been vastly overestimated by lawyers.³ Any impact can be more accurately attributed to legislative and regulatory intervention rather than judicial activity.⁴ For instance, in America, judicial attempts to curb and control the conduct of the police failed to improve its practices and, in some instances, actually encouraged police perjury.⁵ At best, the direct effect of legal rules on public officials is problematic. Furthermore, lawyers often assume that the impact will result in the intended conforming behaviour. Initial research suggests that the impact of law is as likely to be indirect and unintended as direct and intended.⁶ The indeterminacy of the courts' educational effect results from the fact that "the meaning of judicial signals is dependent on the information, experience, skill and resources that disputants bring to them."⁷ As the reported transmissions of the courts are minimal, the administrative audience will only be partially informed, even if they are tuned in to the judicial wavelength. In fact, the Canadian experience is that the corrective and inhibiting influences of judicial decisions ought not be taken for granted at all.⁸ Finance is a more effective and important tool of control than adjudication.

There will, of course, be the landmark cases, such as *Bromley* and *Tameside*, which loom large in the public consciousness. Although these are of symbolic value, their importance must not be underrated. The widespread attention devoted to such celebrated instances underlines the potent and subtle "educative" force of the law. As Douglas Hay has so pertinently observed, "ideologies do not rest on realities, however, but on appearances."⁹ *Bromley* and *Tameside* have not improved the lot of the sickly in National

Health Service hospitals, the homeless on the council housing waiting list, the destitute at the Supplementary Benefit offices or the consumer of public utilities.¹⁰ Such landmark cases are simply isolated instances presented as evidence of the courts' continuing and pivotal involvement in the control of the administration. These infrequent outbursts should not be mistaken for a continuing and productive dialogue. Indeed, even the immediate effect of *Bromley* was minimal; the G.L.C. achieved its general object of reduced fares. In the immigration field, John Evans has conceded that, although it is not "a complete irrelevance," judicial review has little effect on the administrative process; initial dispositions survive procedural correction, subsequent rule changes nullify judicial intervention, no effective modification of impugned administrative behaviour occurs and there is continued ignorance by political applicants of legal rights.¹¹ Accordingly, judicial review is of marginal "quantitative" significance.

III. THE "RAG TRADE" OF ADMINISTRATIVE LAW SCHOLARSHIP

A. *The Conceptual Clothiers*

In the wake of the revived judicial interest in the administrative process, the academic community has greeted enthusiastically the refreshed sources of raw judicial material. Sadly, but predictably, most legal scholars have acted with intellectual deference; they have been happy to follow rather than lead the judges. As such, they have made no real contribution to the debate over the pressing problems of the administrative process. With good cause, the performance and record of most administrative scholars have been assessed as

"dismal."¹² They have deliberately set their sights low. Conceiving of their role as being "to expound the black-letter rules of law in such a way as to reveal *coherence*,"¹³ they seem to relish their self-appointed role as bespoke tailors to the Emperor. Using the available judicial data, they have spun a whole invisible wardrobe of co-ordinated and voguish garments. In the process, they have convinced themselves that the clothes are real and that the Emperor is not naked. This craftsmanship has been given the jurisprudential seal of approval by the master couturier, Ronald Dworkin. He is adamant that "the judge must show the facts of history in the best light he can, and this means that he must not show that history as unprincipled chaos."¹⁴

In the search for coherence, there have evolved two main camps, the "conceptualists" and the "ideologists." The former is by far the most populous, but there are important divisions among their ranks. The conceptualists are united in their attempt to construct and defend a corpus of doctrinal principles, which coalesce to form an effective, fair and objective restraint on State action. This doctrine is claimed to be non-political in origin and objective. At one extreme is a "classical group," headed by H. W. R. Wade¹⁵ and J. F. Garner.¹⁶ Both fit judicial review into a very simple constitutional design. Parliament delegates power to administrative bodies which are accountable both legally and politically. While substantive policies and merits of any decision are political issues, the courts ensure that delegated power is not abused or misused. However, this does not mean a complete subservience to the legislative will. The courts'

constitutional responsibility is to provide "adequate safeguards for the reasonable interests of the individual."¹⁷ For both writers, parliamentary sovereignty is a guiding principle of the English constitution. Another principle is adherence to the Rule of Law.¹⁸ As Wade observes, the judges have sought to "preserve a deeper constitutional logic than that of mere literal obedience to Parliament."¹⁹ The Rule of Law operates as a bulwark against the powerful engines of State running amok.²⁰ Moreover, Wade insists that the existing doctrine of judicial review is devoid of political content or colouring; it represents a neutral and necessary protection of the individual against the abuse of State power.²¹ The fact that the revival of judicial activity coincides with the growth of the modern regulatory state is presumably both appropriate and necessary.

A more enlightened form of "conceptualist" scholarship has arisen recently. Although de Smith rejects the simplistic "classical" approach and concedes that judicial review is "inevitably sporadic and peripheral,"²² he has little constructive to offer in its place. At bottom, he suggests that the courts must maintain standards of formal legality and leave substantive control to political forums.²³ Whereas Wade and Garner experience no doubts over the appropriateness of such foundational premises, de Smith endures some crisis of confidence. Yet he seems insufficiently disturbed to reject such premises entirely. He even goes so

far as to argue that "the degree of unity in the principles traceable in the law of judicial review has been underestimated."²⁴ For de Smith, the need to maintain legitimacy is prior to the need to develop a more sophisticated, less constrained response to the administrative regime of the collectivist state. Similarly, John Evans, while recognising that "judges tend institutionally to conservatism," maintains that "it is the constitutional duty of the courts to give effect to the plain meaning of legislative enactments even though this may result in great hardship or injustice to individuals."²⁵ Despite their troubled consciences, de Smith and Evans defer to what they view as the inevitable. Their progressive sympathies are stifled by their adherence to the traditional ideology which conceives of Parliament as the true source of democratic expression and which the courts must blindly respect.

Such scholarly endeavours fail on two clear counts; they do not provide a convincing account of existing judicial practice nor do they offer a satisfactory plan for future judicial activity. There is ample evidence within the case law to demonstrate judicial interference with the substantive aspects of administrative decisions. Indeed, the possibility of performing a purely formal policing function is remote and suspect.²⁶ Secondly, as a strategy for reform, the "classical" theory is not only ideologically partisan, but fails to preserve its thinly disguised political preferences. In so far as it advocates the application of the common law rules of private law,²⁷ it sanctions the courts' application of the conservative brake of the common law to the more liberal

accelerator of legislation. Whereas modern legislation tends to be regulatory and partially communitarian, the common law remains largely individualistic and pathological.²⁸ Its commitment to individual autonomy in today's urban and technological world is misplaced.

As such, the "classical" approach stymies the potential, but restricted, impact of legislation; "the corollary of this judicial deregulation is a vision of laissez-faire individualism as the embodiment of a 'natural order' . . . that protects individuals from the pervasiveness, inexplicability and uncertainty of regulatory law."²⁹ Notwithstanding its commitment to and dependence on a minimal state, the "classical" weapons are plainly inadequate for the task and a truly "classical" model of judicial review may actually facilitate the spread of the bureaucratic state. While the emphasis upon process and form may result in the protection of individual interests in the occasional dispute, individual interests cannot be effectively protected without resort to substantive precepts. Moreover, the historical facts tell a very different tale. During the supposed revival of administrative law, the administrative process has gone from strength to strength. On the macro-level, the impact of judicial review is difficult to detect.³⁰ On the microlevel, mindful that judicial dealings with the administrative process are pathological, the increased number of applications for judicial review by individuals indicates that all is not what it is made out to be.

Recently, a "neo-classical" approach has begun to gain attention. Recognising the simplism of the earlier work, it still maintains that it is feasible to construct an adequate model of judicial review without the courts being thrown into the political maelstrom of policy-making. For instance, D. J. Galligan suggests that this can be achieved by courts demanding that administrators meet the standards of rational decision-making; "a condition of the legitimacy and justifiability of the exercise of any government power is that decisions be rational and that the powerholder be able to give reasons which both explain and seek to justify its exercise."³¹ Each administrative decision must be capable of being located within a wider complex of goals and policies. Paul Craig supports those standards.³² Further, although he advocates substantive intervention, he explicitly opts out of the search "to find an overarching principle to guide us."³³ Yet, it is not easy to identify or be convinced of the causal link between increased formal rationality and substantive justice. Indeed, it may simply serve to legitimate maladministration. The breadth of the gap that can exist between reasons and action is exemplified by the judicial pronouncements and performance in administrative law.

B. *The Ideological Tailors*

While the "ideologists" are also engaged in the search for coherence, they insist that the law is in a state of conceptual disarray. The

suggestion that there is a subtle, yet meaningful conceptual unity to the case law that meets the dictates of constitutional democracy is dismissed as nothing more than an academic's pipe-dream. Beneath the conceptual chaos, they claim to have unearthed a disturbing ideological coherence. The precise contours of that ideology remain a matter of dispute. For instance, J. A. G. Griffiths maintains that the Rule of Law is only another mask for the rule of "conventional, established and settled interests."³⁴ Far from being a "neutral arbitral force,"³⁵ the judges are concerned to protect and preserve the existing order. With greater sophistication, Patrick McAuslan detects a similar ideological underpinning. Concentrating on planning law, he argues that the law is devoted to maintaining the existing socio-economic order and to frustrating the redistributive potential of law. In spite of appearances to the contrary, administrative law is a tool "to maintain . . . the existing state of property relations in society,"³⁶ and evidences "a predisposition towards individualism."³⁷

Like the conceptualists, the ideologists are guilty of reductionism. While the basic thrust of their arguments is not contested, they ignore and understate the subtle operation of legal doctrine. Although both writers concede that the idea of the Rule of Law is not wholly illusory, they appear to have no systemic, but only an ad hoc, explanation for cases like *Smith* and *Khawaja*. Yet the frequency and

weight of such instances undermine their claim of coherence. The judicial enterprise gravitates between competing ideologies. Apart from ignoring the decisional facts, it is difficult to appreciate why any particular mode of politico-economic organisation requires any given set of rules. Indeed, such a view assumes that law has a direct instrumental effect. The "capitalistic system of society" has weathered the storm of collectivist legislation, welfare statism and industrial nationalisation. It has adapted itself and, arguably, emerged stronger. In the face of such resilience, it is difficult to accept that the "existing order" demands a certain regime of judicial decisions to guarantee its continued survival. Moreover, even if the whole judicial process was willingly committed to the perpetuation of "capitalism," it is often difficult to know why one particular rule in one particular situation is necessarily demanded. Within the judicial process all is not ideologically black or white; the shades of grey are rampant.

At bottom, English legal scholarship is atheoretical. Like the English philosophical tradition, legal academics tend to be pragmatic and functional. They are extremely suspicious of attempts at grand theorising,³⁸ instinctively inclining toward the practical rather than the philosophical. Although this lends an air of relevance and direction to their work, it inhibits the development of long-term proposals. Suggestions for reform tend to be piecemeal and incremental. Yet, for

there to be real change there must be a theory of change. For all his critical energy, Professor Griffith has little to offer by way of improvement. He seems content to despair and depose to the inevitable continuance of the judicial and political status quo. Indeed, he seems to believe that the conscious development of a set of general ground rules by parliamentarians and improved draftinJt⁹ will "introduce order and principle into this part of the law." McAuslan's position is less obvious. While he advocates a genuine move toward greater public participation in planning law,⁴¹ he also seems to envisage a residual , role for the courts.⁴

IV. THE STRUGGLE FOR DEMOCRACY

Legal scholars must redirect their considerable energies and imagination.⁴³ No matter how efficient the judicial process becomes, it is a marginal activity. To concentrate so much time and attention on the courts is to reinforce the mistaken belief that the courts lie at the heart of the legal and political process.⁴⁴ Such misdirected activity diverts necessary talents away from the critical scrutiny and improvement of other modes of bureaucratic control.⁴⁵ Moreover, the academic preoccupation with judicial review insulates and shields the real sources of bureaucratic maladministration from sustained exposure and eradication. A combination of theory and action is demanded. The first step is criticism of existing arrangements; this is a valuable source of

enlightenment and liberation in itself. As Unger warns, "until the central problem . . . of domination is resolved, the search for community is condemned to be idolatrous, or utopian, or both at once."⁴⁶ However, it is ill-advised to rush into constructing grand plans for the "good society." No matter how well-intentioned, the replacement of one form of domination by another must be studiously avoided. As much as individuals are the victim, so they must become the liberators.⁴⁷ The challenge is to suggest tangible and viable programmes through which society can rid itself of domination and begin to glimpse the way things might be.

An obvious candidate for study is "participatory democracy." Judicial review operates as a pale and perverse substitute for genuine and vigorous popular involvement and control. Indeed, the need for judicial review is premised on the failure of the institutional structure of British democracy to ensure meaningful citizen participation in government. At present, power is shuffled around among elite interest groups and the State is captive to private interests.⁴⁸ The forums of popular choice-legislature and market-are deadlocked. Popular participation is reduced to the formal and sporadic ritual by which social arrangements are justified as the product of citizen choice rather than the imposition of elite preference. There must be "a revolution in democratic consciousness."⁴⁹ A radical and substantive vision of a democratic

society has to be imagined and pursued. Democracy must become a way of daily life and embrace the exercise of all social power, public or private: "The idea of democracy is the cutting edge of the radical critique, the best inspiration for change toward a more humane world, the revolutionary idea of our time."⁵⁰

Such a project might best be able to respect the imperatives of historical contingency and social contradiction without becoming enslaved to them. Normative discourse and political conversation would be entrenched and the agenda of political debate and action would be constantly revised. Far from having an ambition of utopian harmony, a robust democracy would rely on disagreement and conflict as its motive force. Legal scholars must turn their attention and energies toward these challenging, but exciting possibilities. The tragic irony of the present practice and doctrine of judicial review is its defence in the name of democracy.⁵¹ The reality is that that legal institution has helped to stymie the participatory initiative and dull the democratic imagination. Legal scholars must commit themselves to arresting and reversing this trend; "self-determination begins at home."⁵² .

ALLAN C. HUTCHINSON*

Notes

¹ [1964] A.C. 40. The immediate reaction to this decision was very cool; see A. L. Goodhart, (1964) 80 L.Q.R. 105 and A. W. Bradley, [1964] C.L.J.

² Lord Guest, "The Executive and The Judiciary" [1973] Jur.Rev. 113, 116. For a more sanguine view, see Justice/All Souls Discussion Paper, *Review of Administrative Law* (1981).

³ For an account of its earlier life dating back to 1800s, see H. W. Arthurs, "Jonah and the Whale: The Appearance, Disappearance and Reappearance of Administrative Law" (1980) 30 U. of Tor.L.J. 225. For instance, in 1888, Maitland noted that: "If you take up a modern volume of the reports of the Queen's Bench Division, you will find that about half the cases reported have to do with rules of administrative law; I mean with such matters as local rating, the powers of local boards, the granting of licences for various trades and professions, the Public Health Acts, the Education Acts, and so forth." *Constitutional History of England* (1955), p.505.

⁴ Despite the refusal of the legal community to recognise this state of affairs, we exist in an age of statutes. The common law, if not dead, is in its death throes; see G. Calabresi, *A Common Law for the Age of Statutes* (1982) and Hutchinson and Morgan, "Calabresian Sunset: Statutes in the Shade" (1982) 82 Columbia L.Rev. 1752.

⁵ For many, "ideology" is a disturbing and subversive word. In this paper, it refers to the constellation of ideas, beliefs and assumptions which comprise a certain way of thinking about law at any given time. It offers a shared construction of reality and makes facts amenable to ideas, and ideas to facts. Any particular ideology assumed by any group provides both an intelligible description of the experiential world and a mutual prescription for action. It is the essence of an ideological inquiry to penetrate the surface of social "reality" and to evaluate the fit between ideas and events, between theory and practice. The challenge is to expose the actual workings of law in society, to reveal the interests that are identified with universal claims, to discover the process by which contradictions in the world are denied and the status quo presented as a natural, rather than a contingent, state of affairs.

⁶ "Administrative Law and Administrative Theory: The Dismal Performance of Administrative Lawyers" (1978) 9 Cambrian L.Rev. 40, 41. See, also, M. Loughlin, "Beyond Complacency" (1983) 46 M.L.R. 666.

⁷ In line with most contemporary writing, administrative law is given an impoverished meaning; the body of legal doctrine developed by the courts to govern the relationship between the State and the citizen. In its wide sense of the actual law and practice that comprises State regulation, administrative law has been largely ignored by academics.

⁸ W. Harvey, "The Rule of Law in Historical Perspective" (1961) 59 Mich.L.Rev. 487, 491.

⁹ M. Shapiro, *Courts: A Comparative and Political Analysis* (1981) p.121.

¹⁰ See *infra* pp.318-321.

¹¹ See e.g. T. Prosser, "Toward A Critical Public Law" (1982) 9 Brit.J. of Law & Soc. 1 and *infra* pp.320-322.

¹² This refers to the work of a group of radical scholars in the United States. Their work embraces a wide range of sources and positions. Although this article is strongly influenced by the writings of Duncan Kennedy and Roberto Unger, the critical analysis employed here is intended to stand or fall on its own; see Hutchinson, "From Cultural Construction to Historical Deconstruction" (1984) 94 Yale L.J. 209. Also, for a critical account of the development, thrust and future of this group, see Hutchinson and Monahan, "Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought" (1983) 36 Stan.L.Rev. 199.

¹³ Although often characterised as a dilemma of modern liberalism, this contradiction troubled much earlier thought; see I. Berlin, "The Originality of Machiavelli" in *Against The Current* (1980) at pp.45-79 and L. Dumont, "A

Modified View of Our Origins: The Christian Beginnings of Modern Individualism" (1982) 12 *Religion* 1.

¹⁴ See T. Kuhn, *The Structure of Scientific Revolutions* (2nd ed., 1970).

¹⁵ See, M. Weber, (ed. M. Rheinstein) *Law in Economy and Society* (1954).

¹⁶ *Whigs and Hunters: The Origins of the Black Act* (1978), at pp.265-265.

¹⁷ Unger, "The Critical Legal Studies Movement" (1983) 96 *Harv.L.Rev.* 561, 574. The following arguments represent a condensed version of a much fuller thesis, see A. Hutchinson and P. Monahan, "The Rights' Stuff: Roberto Unger and Beyond" (1984) 62 *Tex.L.Rev.* 1477.

¹⁸ R. Dworkin, "Law as Interpretation" (1982) 60 *Tex.L.Rev.* 527.

¹⁹ For instance, Dworkin identifies a "rights-based" thread, whereas Posner unearths an "efficiency" criterion; see *Taking Rights Seriously* (1979) and *The Economics of Justice* (1980) respectively.

²⁰ Livingstone, "Round and Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship" (1982) 95 *Harv.L.Rev.* 1669, 1670. In a recent article, Gareth Jones asks "when, if at all, should judges step into the political arena?" The question is misconceived. The question ought to be how they act in the political arena; see "Should Judges Be Politicians? The English Experience" (1982) 57 *Ind.L.J.* 211.

²¹ Wade and Phillips' *Constitutional and Administrative Law* (9th ed., 1979, A. W. Bradley) pp.557-558. A very similar point is made by Hartley and Griffith; see *Government and Law* (2nd ed., 1981), p.334.

²² This regime is distinct from pure egotism in that it demands respect for the rights of others. It simply states that it is legitimate for individuals to prefer their own interests over those of others and they have no obligation to share the benefits of their efforts. It can be roughly equated with classical libertarianism. The writings of A. V. Dicey represent such a vision; See *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* (1905). More recent adherents are R. Nozick, *Anarchy, State and Utopia* (1974) and F. Hayek, *Law, Legislation and Liberty* (1969).

²³ This regime is distinct from pure selflessness in that it does not expect a complete denial of one's own interests. It simply states that it is illegitimate to make a sharp distinction between one's own interests and the interests of others. See K. Marx, *Economic and Philosophic Manuscripts of 1844* (ed. D. J. Struick, 1964).

²⁴ Traditional legal thought is unified in the belief that adjudication is an exercise in "bounded objectivity"; see O. Fiss, "Objectivity and Interpretation" (1982) 34 *Stan.L.Rev.* 739, 745.

²⁵ See e.g. Wade, *infra* note 114, at pp.439-451; Garner, *infra* note 115, at pp.139-144;

²⁶ Evans, *infra* note 37, at pp.163-179. This analysis, of course, can be replicated

throughout administrative law doctrine. An obvious example is the extent to which discretion can be exercised in line with a fixed policy or on a case-by-case basis. For a traditional review of this area, see H. L. Molot (1972) 18 *McGill L.J.* 310 and D. J. Galligan [1976] *P.L.* 332, 346-355.

²⁶ Paradoxically, in contemporary society and its political practices, the communitarian-minded might well prefer the apparently individualistic position. In reality, the "communal" decision may well be exercised for the benefit of certain individual interests; see *supra* pp. 313-314. It has to be remembered that the communitarian vision is an *ideal* and assumes that "communal" decisions are made by a sincere and *representative* administrative agency.

²⁷ See *Breen v. Almagamated Engineering Union* [1971] 1 *All E.R.* 1148.

²⁸ See *McInnes v. Onslow Fane* [1978] 1 *W.L.R.* 1520. See also, Evans, *infra* note 37, at p.179.

²⁹ Unger, *supra* note 17, at pp.633-634.

³⁰ A. V. Dicey, *Law and Public Opinion in England in the Nineteenth Century* (1905)

p.64. Later, he conceded that the delegation of power was "inevitable," but "such a transference of authority saps the foundation of [the] rule of law"; see "The Development of Administrative Law in England" (1915) 31 *L.Q.R.* 148, 150.

³¹ See R. Miliband, *The State in Capitalist Society: The Analysis of the Western System of Power* (1969) and N. Poulantzas, *State, Power, Socialism* (1979).

³² See J. O'Connor, *Fiscal Crisis of The State* (1974) and T. Benn, *Arguments for Democracy* (1982).

³³ Unger, *supra* note 17 at p.589.

³⁴ W. Friedmann, *Law in a Changing Society* (1964), pp.378-383.

³⁵ D. J. Galligan, "Judicial Review and the Textbook Writers" (1982) 2 Oxf.J. of Leg.St. 257, 258.

³⁶ See *infra* pp. 315-318.

³⁷ See de Smith's *Judicial Review of Administrative Action* (4th ed., 1980, John Evans), pp.3-35 and P. Craig, *Administrative Law* (1983), pp.57-88.

³⁸ It is not intended to quote extensively from individual judgments. The model is offered as a composite picture. Much of the model is implicitly assumed rather than expressly stated. Reference will be made to particular decisions in a sparing and generalised way. There is no conscious attempt to misrepresent or caricature the judicial views of constitutional arrangements. Along with Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 Harv.L.Rev. 1685 and "The Structure of Blackstone's Commentaries" (1979) 28 Buff.L.Ref. 205, the work of Philip Selznick and Philippe Nonet has been drawn upon; see *Law and Society in Transition* (1978).

³⁹ See *Duport Steel Ltd. v. Sirs* [1980] 1 All E.R. 529, 551, *per* Lord Scarman.

⁴⁰ See *Black-Clawson International Ltd. v. Papierwerke Waldorf-Aschaffenburg A.G.* (1975) A.C. 591, 645, *per* Lord Simon of Glaisdale.

⁴¹ See *R. v. Greater London Council, ex p. Royal Borough of Kensington and Chelsea*, *The Times*, April 7, 1982, *per* McNeill J.

⁴² R. Stewart, "The Reformation of American Administrative Law" (1975) 88 Harv.L.Rev. 1669, 1706.

⁴³ See *R. v. Boundary Commission for England, ex p. Gateshead Borough Council and others* [1983] 1 All E.R. 1099, *per* Sir John Donaldson M.R. Lord Scarman referred to this as "a fluctuating frontier war between the judges and the executive"; see "Public Administration and The Courts" (1979) 57 Public Admin. 1, 2.

⁴⁴ See *Re Evans* [1982] 1 W.L.R. 1155, 1158-161, *per* Lord Hailsham.

⁴⁵ *Supra* note 40, at p.613, *per* Lord Reid.

⁴⁶ *Laker Airways Ltd. v. Department of Trade* (1977) 2 W.L.R. 235, 267.

⁴⁷ Lord Devlin, *Samples of Lawmaking* (1963), p.2.

⁴⁸ There is no settled group of methodological principles used, but simply a plethora of judicial dicta of varying weight, age and uniformity; see W. Twining and D. Miers, *How To Do Things with Rules* (2nd ed., 1982), p.334 and R. Cross, *Statutory Interpretation* (1976), p.42. Nonetheless, many basic textbooks devote considerable space to the elaboration of the famous triumvirate of Literal, Golden and Mischief Rules, along with a series of presumptions and canons of construction; see Walker and Walker, *The English Legal System* (5th ed., 1980), pp.99-122. However, some writers now argue that the great triumvirate have coalesced into a general "purposive" approach; see D. Lloyd, *Introduction to Jurisprudence* (4th ed., 1979), p.865 and E. Driedger, *The Construction of Statutes* (1974), p.67. Yet, despite the apparent liberalisation, this purpose is to be gleaned from the words of the statute. A particularly trenchant statement of judicial practice is made by Lord Salmon in *Johnson v. Moreton* [1980] A.C. 37, SO.

⁴⁹ *Supra* note 45.

⁵⁰ The established view of the handling of the so-called *casus omissus* is that "if a gap is disclosed, the remedy lies in an amending Act." To do otherwise would amount to "a naked usurpation of the legislative function under the thin disguise of interpretation"; see *Magor and St. Mellons Rural District Council v. Newport Corporation* [1952] A.C. 189, 191. Although stated in less extravagant terms, the House of Lords has recently reaffirmed this conviction; see *James Buchanan & Co. Ltd. v. Babco Forwarding and Shipping (U.K.) Ltd.* [1978] A.C. 141 and *Nothman v. London Borough of Barnet* [1979] 1 All E.R. 142 (H.L.). Nonetheless, the courts have been prepared to assume the authority to fill gaps in several cases; see *e.g. Williams v. Williams* [1979] P. 271.

⁵¹ See, generally, R. Stewart and C. Sunstein, "Public Programs and Private Rights" (1982) 95 Harv.L.Rev. 1195, 1229-1231.

⁵² See *Bromley L.B.C. v. Greater London Council* [1982] 2 W.L.R. 62 (H.L.). For a

"rhetorical" analysis of this case, see P. Goodrich, "Law and Language" (1984) *J. of Law & Soc'y.* 173, 191-200.

⁵³ *Ibid.* at p.109, *per* Lord Keith.

⁵⁴ *Ibid.* at pp.114, 117, 120, *per* Lord Scarman and p.108, *per* Lord Diplock.

⁵⁵ *Ibid.* at pp.127 and 128, *per* Lord Brandon.

⁵⁶ *Ibid.* at p.101, *per* Lord Diplock.

⁵⁷ *Ibid.* at p.94, *per* Lord Wilberforce.

⁵⁸ *Ibid.* at p.118, *per* Lord Scarman.

⁵⁹ *Ibid.* at p.100, *per* Lord Diplock.

⁶⁰ *Ibid.* at p.97 *per* Lord Wilberforce and, also, p.106, *per* Lord Diplock.

⁶¹ The difficulties of discovering legislative intent have been thoroughly documented; see R. Dickerson, "Statutory Interpretation: A Peek Into the Mind of a Legislator" (1975) 50 *Ind.L.J.* 206.

⁶² *H.C. Deb.*, Vol. 775, col. 1247. For a succinct history of the Act, see (1983) 99 *L.Q.R.* 605, 615-630.

⁶³ *Supra* note 52, at p.97, *per* Lord Wilberforce (emphasis added).

⁶⁴ *Ibid.* at p.95-96, *per* Lord Wilberforce, pp.110-111, *per* Lord Keith, pp.119-121, *per* Lord Scarman and pp.127-129, *per* Lord Brandon.

⁶⁵ *Ibid.* at p.123, *per* Lord Scannan.

⁶⁶ See M. Castells, *The Urban Question* (1977), pp.454-462 and P. Dunleavy, *Urban Political Analysis* (1980), pp.42-52.

⁶⁷ *Ibid.* at p.110.

⁶⁸ See J. Buchanan, *Traffic in Towns* (1963); C. Sharp, *Transport Economics* (1973);

A. Grey, *Urban Fares Policy* (1975) and C. A. Nash, *Economics of Public Transport* (1982).

⁶⁹ For instance, G.L.C.'s investment of £93m. represents about 15 per cent. of the annual investment by New York on the city's subway system. Indeed, the Americans seem to accept that public transport is a social and community responsibility; see U.S. Dept. of Transportation, *A Study of Urban Mass Transportation Needs and Financing* (1974). For a general view, see P. M. Morris, "Should We Subsidize Public Transport?" (1983) 54 *Pol.Quart.* 392.

⁷⁰ D. Kennedy, "Legal Formality" (1973) 2 *J.Leg.Stud.* 351, 385.

⁷¹ The Transport Act 1983 repeals ss.7 and 11 and replaces them with a provision that imposes a common and simplified version of the financial duty; "2(1) An Executive shall so perform their functions as to ensure so far as practicable that the combined revenues of the Executive and any subsidiaries of theirs for any accounting period are not less than sufficient to meet their combined charges properly chargeable to revenue account in that period." For a discussion of the changes, see M. Loughlin, "Public Transport Subsidy, Local Government and the Courts" (1983) 132 *N.L.J.* 283.

⁷² *Supra* note 70, at p.386.

⁷³ See M. Cappelletti, "The Law-Making Power of the Judge and Its Limits: A Comparative Analysis" (1981) 8 *Monash U.L.Rev.* 15, 21-22.

⁷⁴ But see Kerr L.J., *infra* note 78. He argues forcefully that any suggestion that the House of Lords' decision was politically motivated was "total rubbish."

⁷⁵ The observation made by Harold Laski over 50 years ago in the wake of *Roberts v. Hopwood* [1925] A.C. 578, remains very pertinent today: "The test of reasonableness is, of course, one that it is seldom easy to apply in a court of law..For . . . it tempts the judge to believe that he is simply finding the law when in fact he is really testing and rejecting other men's views by the light of his own . . . The [G.L.C.] is a body of persons chosen to carry out certain functions delegated to them by Parliament. There are various ways of carrying out those functions, and each way, ultimately, expresses a philosophy of life . . . The [G.L.C.'s] theory of what is 'reasonable' in the exercise of discretion is, even though affirmed by its constituents, seemingly inadmissible if it does not square with the economic preconceptions of the House of Lords . . . [The judges] are, in the exercise of their functions, enacting into law a system of social philosophy; it is inevitable, accordingly, that they should be judged by the social philosophy they enact

. . . it is an easy step from the [*Bromley*] judgment to the conclusion that the House of Lords is, in entire good faith, the unconscious servant of a single class in the community." *Studies in Law and Politics* (1932), pp.20S-221.

¹⁶ The requirement that the Council balance the interests of the ratepayers

and transport users is drawn from the common law constraint of "reasonableness"; see *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1K.B. 223, 233- 234, per Lord Greene and Roberts, *supra* note 75.

⁷⁷ See e.g. Griffiths, "Fares Fair or Fiduciary Foul?" [1982] Camb.L.J. 216; Note (1982) 98 L.Q.R. 177; and Griffiths, "The Law Lords and the G.L.C." *Marxism Today*, February 1982, p.29.

⁷⁸ See *R. v. Lontfon Transport Executive, ex p. Greater London Council* [1983] 2 All E.R. 262.

⁷⁹ *Ibid.* See, also, *Manchester City Council v. Greater Manchester County Council* (1980) 78 L.G.R. 560.

⁸⁰ See e.g. Comment (1982) 146 Loe.Govt.Rev. 37, S. N. H. Bull (1983) 13 Vict.U. of Well.L.Rev. 193 and Note (1983) 98 L.Q.R. 177.

⁸¹ [1976] 3 W.L.R. 641.

⁸² (1978) 1 All E.R. 411. See, also, *North Yorkshire County Council v. Secretary of State for Education and Science*, *The Times*, October 20, 1978.

⁸³ *Ibid.* at p.422, per Browne L.J.

⁸⁴ Whereas *Tameside* concerned s.68 of the Education Act, 1944 which empowered the Secretary of State to intervene if a local education authority acted "unreasonably," *Smith* involved s.8(1) of the same Act which obliged the local education authority to provide sufficient schools "in number, character and equipment."

⁸⁵ See *supra* note 52, pp.107- 109, per Lord Diplock and p.129, per Lord Brandon. See, also, *Norwich C.C. v. Secretary of State for the Environment* (1982) 1 All E.R. 737.

⁸⁶ (1983) 2 W.L.R. 321.

⁸⁷ *Ibid.* at p.332.

⁸⁸ (1974) A.C. 18.

⁸⁹ (1978) 1 W.L.R. 700.

⁹⁰ (1980) A.C. 930. See also *Choudhary* (1978] 1 W.L.R. 1177 (C.A.) and *Eqbal* (1979] 1 Q.B. 264 (C.A.).

⁹¹ *Supra* note 86, at p.17.

⁹² *Ibid.* at p.7.

⁹³ Unger, *supra* note 17, at p.579.

⁹⁴ See *supra* pp. 302-303. For a selection of privative clauses and their treatment by the courts, see de Smith, *supra* note 37, at pp.357-376 and Garner, *infra* note 98, at pp.175-192.

⁹⁵ H. W. Arthurs, *Protection Against Judicial Review* (unpublished manuscript, 1982),

p.7. The enactment of the Tribunals and Inquiries Act 1957 is often cited as providing legislative endorsement for this restrictive interpretation. Apart from giving approval to the adoption of vague generalities like fairness, impartiality and openness in administrative adjudication, it expressly nullified privative clauses in almost all statutes extant in 1957. Yet, surely, this decision to wipe the slate clean supports the view that henceforth any privative clause enacted by Parliament was to be taken very seriously and given full effect. For a forceful and cogent critique of the Franks Report, see J. A. G. Griffith, "Tribunals and Inquiries" (1959) 22 M.L.R. 125.

⁹⁶ *Re Racial Communications* (1980) 2 All E.R. 634, 646, per Lord Scarman.

⁹⁷ (1969] 2 A.C. 147.

⁹⁸ See *Racial*, *supra* note 96 at pp.63-64, per Lord Diplock. Indeed, Craig goes so far as to say Parliament is "powerless"; *supra*, note 37 at p.524.

⁹⁹ See *supra* p. 301.

¹ See P. McAuslan, "Administrative Law, Collective Consumption and Judicial Policy" (1983) 45 M.L.R. 1.

² These figures are drawn from the *Civil Judicial Statistics*. While they are an uncertain and imprecise guide, Evans uses these figures to support his view about the "striking" growth in judicial review. He also argues that "the qualitative record . . . is more impressive than the quantitative"; *supra* note 37 p.31.

Applications	1908	19/1	19/4	19/11	19/9
	81	221	160	3/6	410
Orders	24	36	52	29	71

A similar non-instrumental critique is made by Harlow and Rawlings, see *Law and Administration* (1984), pp.256-283.

³ See e.g. H. Beale and D. Dugdale, "Contracts Between Businessmen: Planning and Use of Contractual Remedies" (1975) 2 Brit.J. of L. & Soc. 45 and Weekes, Mellish, Dickens and Lloyd, *Industrial Relations and the Limits*

of the' Law (1975). Interestingly, even after *Roberts*, *supra* note 75, wages paid by the Council were higher than the average. See N. Branson, *Poplarism, 1919-25* (1979), p.220.

⁴ See R. Epstein, "The Social Consequences of Common Law Rules" (1982) 95 *Harv.L.Rev.* 1717, 1744-1751, and J. Griffiths, "Is Law Important?" (1979) 54 *N.Y.U.L.Rev.* 339, 351-356.

⁵ See Oaks, "Studying the Exclusionary Rule in Search and Seizure" (1970) 37 *U.Chi.L.Rev.* 665 and *Bivens* 403 U.S. 388 (1971).

⁶ See e.g. L. Ross, "The Scandinavian Myth: The Effectiveness of Drinking and Driving Legislation in Sweden and Norway" (1975) 4 *J. Legal Stud.* 285.

⁷ "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law" (1981) 19 *J. of L.Plur.* 1, 32.

⁸ See W. A. Angus, "The Individual and the Bureaucracy: Judicial Review-Do We Need It?" (1974) 20 *McG.L.J.* 177. See, also, A. Page, "Legal Analysis of Economic Policy-2" (1982) 9 *J. of Law & Soc.* 225, 246--248. The American experience with the administrative process is discussed in Hutchinson, "Alien Thoughts: A Comment on Constitutional Scholarship" (1985) 57 *S.Cal.L.Rev.* (forthcoming).

⁹ "Property, Authority and Criminal Law" in *Albion's Fatal Tree* (1975), p.36.

¹⁰ See McAuslan, *supra* note 1 at p.5.

¹¹ *Immigration Law* (2nd ed., 1983), p.412. Indeed, Bridges goes so far as to say that "immigration appeals were a perfect legal buffer, enabling the state to maintain a liberal image while pursuing essentially illiberal policies": see "Legality and Immigration Control" (1975) 2 *Brit. J. of Law & Soc'y.* 221, 224.

¹² McAuslan, *ante* note 6, at p.48. For a powerful and critical assessment of modern scholarship, see Harlow and Rawlings, *supra* note 2.

¹³ N. Simmonds, "The Changing Face of Private Law: Doctrinal Categories and the Regulatory State" (1982) 7 *Leg.St.* 257, 258.

¹⁴ "Natural Law Revisited" (1982) 34 *U.Aorida.L.Rev.* 165, 169. See also N. McCormick, *Legal Reasoning and Legal Theory* (1978), pp.106-107.

¹⁵ *Administrative Law* (5th ed., 1983).

¹⁶ *Administrative Law* (5th ed., 1979).

¹⁷ *Ibid.* at p.20.

¹⁸ Of Diceyan origin, the Rule of Law has become a legal-cultural artifact. It embraces three intertwined principles: due process, equality before the law and judicial involvement. The importance of these supposedly foundational precepts is continually being affirmed; see *Remedies in Administrative Law*, Working Paper No. 40 (1971), at p.29. For a trenchant criticism of this precept, see H. W. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 *Osg. Hall L.J.* 1.

¹⁹ Wade, *supra* note 15 at p.573.

²⁰ *Ibid.* at p.5.

²¹ *Ibid.* at p.24.

²² *Ante* note 37 at p.1.

²³ *Ibid.* at pp.31-34 and p.279.

²⁴ *Ibid.* at pp.66-67.

²⁵ *Supra* note 11, at pp. 421, 424.

²⁶ See *supra* pp. 3@:314.

²⁷ See e.g., Lawton L.J., *ante* note 46 and Evans, *supra* note 11 at pp.410--15. The seemingly pro-communitarian appearance must not be mistaken for its more pro-individualistic reality; see *supra* pp.7-8. Nevertheless, it would be equally culpable to deny that legislation has no communitarian impact; see A. Hutchinson and D. Morgan, *The Semiology of Statutes* (1984) 21 *Harv.J. on Legis.* 583.

²⁸ Note, "Intent, Clear Statements and the Common Law: Statutory Interpretation in the Supreme Court" (1982) 95 *Harv.L.Rev.* 892, 911.

²⁹ See *supra* pp. 315-318.

³⁰ *Ante* note 34, at p.271.

³¹ *Ante*, note 37 at p.49.

³² *Ibid.* at p.55.

³³ See *The Politics of the Judiciary* (2nd ed., 1981), p.240.

³⁴ See, generally, Lord Devlin, "Judges and Lawmakers" (1976) 39 *M.L.R.*

³⁵ "The Ideologies of Planning Law" (1979) 2 *Urb.L. & Policy* 1, 9.

³⁶ *Supra*, note 1 at p.11.

³⁷ As Passmore noted, "the fact that we have to live with is that if most British philosophers are convinced that continental metaphysics is arbitrary, pretentious and mind-destroying, continental philosophers are no less confident that British empiricism is philistine, pedestrian and soul-destroying"; *A Hundred Years of Philosophy* (1956), p.459.

³⁹ See Griffith, "Constitutional and Administrative Law" in (P. Archer and A. Martin (eds.)), *More Law Reform Now* (1983), pp.58-59.

⁴⁰ See Griffith, Comment, *New Society*, November 19, 1981, p.32.

⁴¹ *Supra* note 36 at pp. 19-20.

⁴² *Supra*, note 1 at p.20.

⁴³ For a similar plea, see Loughlin, *ante*, note 6 at pp.672-673.

⁴⁴ Not all scholars are guilty of this. *E.g.*, J. Jowell and M. Partington engage in "affiliated administrative law"; see *e.g. Welfare Law & Policy* (1979).

Very little attention is given by legal academics to the role of parliamentary committees or the Parliamentary Commissioner. What attention there is tends to be rather descriptive and uncritical; but see A. W. Bradley, "The Role of the Ombudsman in Relation to the Protection of Citizens' Rights" (1980] *Camb.L.J.* 304. For a critical account, see Harlow and Rawlings, *supra* note 2 at pp.199-226.

⁴⁶ Unger, *Knowledge and Politics* (1975), p.252.

⁴⁷ For a full discussion of the need to resist this temptation, see Hutchinson and Monahan, *ante* note 12 at pp.834-836.

⁴⁸ See J. Habermas, *The Legitimation Crisis* (1975). This impasse is recognised and

condemned by many liberal theorists. For instance, Ronald Dworkin concedes: "It is no doubt true, as a very general description, that in a democracy power is in the hands of the people. But it is all too plain that no democracy provides genuine equality of political power. Many citizens are for one reason or another disenfranchised entirely. The economic power of large business guarantees special political power for its managers. Interest groups, like unions and professional organisations, elect officers who also have special power. Members of entrenched minorities have, as individuals, less power than individual members of other groups that are, as groups, more powerful. *These defects in the egalitarian character of democracy are well known and perhaps in part i'emedial.*" *Political Judges and the Rule of Law* (1980), p.281 (emphasis added).

⁴⁹ C. B. Macpherson, *Democratic Theory: Essays in Retrieval* (1973), p.184. The arguments that follow are pursued further in A. Hutchinson, "Of Kings and Dirty Rascals: The Struggle for Democracy" (1984) 9 *Queen's L.J.* 54 and "Beyond No-Fault" 73 *Cal. L. Rev.* (forthcoming).

⁵⁰ H. Pitkin and S. Shumer, "On Participation" (1982) 2 *Democracy* 43. See, also, J. Cohen and J. Rogers, *On Democracy* (1983), pp.146-183.

⁵¹ Many argue, like George Bernard Shaw, that "democracy substitutes election by the incompetent many for appointment by the corrupt few"; see *Man and Superman* (1904),

p.228. While it is true that there is much apathy and ignorance, a genuine long-term commitment to full democracy would test this fearful pessimism. For a critique in this vein, see Stewart, *ante* note 42 at pp.1792-1802. Democracy has the capacity to create and sustain its own momentum. As people began to reclaim control over their own lives, they might develop an appetite for more. Domination thrives when people lose the sense that social life is created by and can be changed by people. The present situation is not without hope. For instance, South Yorkshire have frozen fares since 1974.

⁵² H. Marcuse, *Essay on Liberation* (1968), p.88.

• Associate Professor, Osgoode Hall Law School, Toronto, Canada. In writing this paper, I have incurred many debts. I am grateful to Harry Arthurs, Patrick Atiyah, John Evans, Michael Gottheil, John Griffith, Michael Kanter, Martin Loughlin, Derek Morgan, David Sugarman and, especially, Patrick Monahan. The final version of this paper was completed in June, 1984.